## United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

## Advice Memorandum

DATE: February 24, 2010

TO : Michael Josserand, Regional Director

Region 27

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: PPL Montana, LLC 530-6067-6001-3720

Case 27-CA-21327 530-6067-6001-3740

530-6067-6001-3755 530-6067-6001-3780

This Section 8(a)(5) case was submitted for advice as to whether the Union's request for subcontracting information was premature where the Union sought the information to prepare for bargaining negotiations for an agreement that expired in 33 months.

We conclude, in agreement with the Region, that the Union's information request was premature because the Union failed to show that it needed the information in furtherance of its duties as the employees' bargaining representative at the time of the request.

## **FACTS**

IBEW Local 1638 (the Union) represents a unit of employees at the Colstrip Steam Electric Station owned by PPL Montana, LLC (the Employer) in Colstrip, Montana. The parties have had successive collective bargaining agreements with the most recent contract effective from May 1, 2008 to April 30, 2012.

Article 39.1 of the parties' contract entitled "Independent Contractors" addresses the Employer's right to subcontract out bargaining unit work:

The Company agrees that it will not contract out the work historically performed by bargaining unit employees, if such contracting will directly result in a lay off or reduction of regularly scheduled work hours of bargaining unit employees.

There is no reopener clause in the contract.

On September 16, 2008, the Union made a request for subcontracting information, stating that it was doing research for present and upcoming issues that may evolve into a grievance situation. The Employer denied the request because the Union failed to present information reflecting that the Employer had violated Article 39.1. The Union also requested subcontracting information on October 14, 2008, but changed its reason for the request, stating that it needed the information to prepare for future negotiations. The Employer again denied the Union's request and indicated that it would respond to the request closer to the expiration of the contract in 2012.

On June 22, 2009, 1 the Union's Business Manager sent a letter to the Employer's Labor Relations Specialist again requesting subcontracting information:

In order to determine the effect contracting out of work at CSES has had on the membership of [the Union] and with the advice of both our international leadership and our council, I have decided to reinstate my earlier request for information. Please provide the following:

- 1. The names of contractors and subcontractors performing work on PPL Montana's Colstrip Plants starting with our contract year of 2002 and each year thereafter to this date.
- 2. Please include the type of work performed and each of their union or nonunion affiliation.
- 3. The man-hours billed PPL Montana by each contractor or sub-contractor that would be listed above.
- 4. Any description of work performed that would provide the local with information

<sup>1</sup> Hereafter, all dates 2009 unless otherwise noted.

indicating whether the work was routine maintenance or specialty work.

On July 14, the Union's Business Manager met with the Employer's HR Director. At the meeting, the HR Director inquired about the basis for the Union's June 22 information request. The Business Manager stated that when the Employer bought the company in 2000, there were only about 5 to 15 contract employees who were mainly used for emergency outages and capital projects. He explained that gradually the number of contract employees had grown and now it was not uncommon to see 50 to 70 on a jobsite on a daily basis. Given this trend, he stated that the Union needed to be able to determine how much work they were losing so they could better identify it during the negotiation process and draft a decent contract proposal to rectify the problem.

On July 23, the HR Director sent the Union a letter denying the Union's information request. The letter stated that the Union had not provided any additional compelling reason for the information other than that in its written request; therefore the requested was denied on the same grounds as before.

There have been no further discussions between the Union and Employer regarding the Union's information request.

## ACTION

We conclude, in agreement with the Region, that the Union's information request was premature because the Union failed to show that it needed the information in furtherance of its duties as the employees' bargaining representative at the time it made the request.

It is well settled that an employer's bargaining obligation includes the duty to provide information needed by a union in furtherance of its responsibility as the employees' collective bargaining representative. Where the information requested pertains to bargaining unit employees, that information is presumptively relevant, and the employer must provide it. But where the information

NLRB v. Acme Industrial Co., 385 U.S. 432, 435 (1967).

sought relates to employees outside the bargaining unit, the union must show that the information is necessary and relevant.<sup>3</sup> Information about subcontracting employees relates to employees outside the bargaining unit. Thus, the "[i]nformation about subcontracting agreements, even those relating to bargaining unit employees' terms and conditions of employment, is not presumptively relevant."<sup>4</sup> The union therefore has the burden of establishing the relevancy and necessity for such information.<sup>5</sup>

Where a union needs subcontracting information to assist with the administration of a current contract or to prepare for future bargaining, that information is relevant and necessary.  $^6$ 

Here, the Union articulated a need for the information to assist with future bargaining only, not to monitor the existing contract. Thus, the question is whether that information was necessary at the time of the request or whether it was premature.

In <u>West Penn Power Co.</u>, the Board held that a request for subcontracting information was not premature when at the time of the union's two requests, the contract was expiring in eight months and then four months. The Board distinguished the request in <u>West Penn Power Co.</u> from the

<sup>3</sup> Richmond Health Care, 332 NLRB 1304, 1305, fn. 1 (2000);
Associated Ready Mixed Concrete, 318 NLRB 318, 318 (1995);
Pfizer, Inc., 268 NLRB 916, 918 (1984), enf'd. 763 F.2d 887
(7th Cir. 1985).

<sup>&</sup>lt;sup>4</sup> <u>Disneyland Park</u>, 350 NLRB 1256, 1258 (2007) citing Richmond Health Care, 332 NLRB at 1305 fn. 1.

<sup>5</sup> Allison Corp., 330 NLRB 1363, 1367 (2000); Postal Service, 332 NLRB 635, 636 (2000).

<sup>6 &</sup>lt;u>Id</u>. at 1368; See <u>West Penn Power Co.</u>, 346 NLRB 425, 427-29 (2006) (holding information necessary and relevant where union needed subcontracting information to monitor contract violation, prepare for arbitration, and assist with upcoming negotiations).

request made in <u>General Electric Co. v. NLRB</u>, <sup>7</sup> where at the time of the request for subcontracting information, the contract was due to expire in 16 months. <sup>8</sup> In <u>General Electric</u>, the Seventh Circuit, denying enforcement of the Board's Order, held that the union's request was premature for the purpose of upcoming negotiations, as the earliest that negotiations could commence was 13 months away. <sup>9</sup>

The Board in <u>West Penn Power Co.</u> also noted that in that case the contract contained a reopener that the union might have been able to invoke to renegotiate the provisions dealing with subcontracting if the information it requested showed a necessity to do so, whereas in <u>General Electric</u>, there was no evidence of a reopener. <sup>10</sup> Therefore, the Board concluded that the request was not premature because the union needed the information to start preparing for bargaining at the time of the request. <sup>11</sup>

Based on the above, we conclude that in the instant case the Union's request was premature. Unlike in <u>West Penn Power Co.</u>, where the parties' contract was due to expire in less than four months from the time of the last request and the contract contained a reopener clause to invoke negotiations, here, at the time of the request, the contract would not expire for another 33 months, more than

General Electric Co. v. NLRB, 916 F.2d 1163 (7th Cir. 1990), denying enf. to 294 NLRB 146 (1989).

 $<sup>^{8}</sup>$  West Penn Power Co., 346 NLRB at 428-429.

<sup>&</sup>lt;sup>9</sup> General Electric Co. v. NLRB, 916 F.2d at 1170-1171. The Board, in holding that the employer violated Section 8(a)(5) by not providing the information, did not pass on whether a request made 16 months before contract expiration was premature but instead relied on the fact that the union specifically explained that it sought the information to use in upcoming negotiations and that, "at least by the time of hearing in the case, the negotiations were sufficiently close at hand to require the respondent to provide the information." 294 NLRB at 146.

<sup>10</sup> West Penn Power Co., 346 NLRB at 428-429.

<sup>&</sup>lt;sup>11</sup> Id.

twice as long as the 16 months in <u>General Electric</u>. Even considering, as the Board did in <u>General Electric</u>, the date of hearing, as opposed to the date of the request, expiration would be some 24 months away, not "close at hand," as in <u>General Electric</u>. Additionally, there is no reopener clause in the contract in the instant case. Thus, the information was not needed for bargaining at the time of the request.

Accordingly, absent withdrawal, the Region should dismiss the charge.

/s/ B.J.K.